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Supreme Court of the United States

OCTOBER TERM, 1928.

No. ~~332~~ 64

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Cross-Appellants,

v.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,

Cross-Appellee.

STATEMENT ON BEHALF OF CROSS-APPELLANTS DISCUSSING BASIS ON WHICH THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE OF THE COURT OF APPEALS OF MARYLAND.

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Baltimore, Maryland,
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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 826.

HAROLD E. WEST, CHAIRMAN, AND J. FRANK HARPER AND STEUART PURCELL, MEMBERS, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND,

Cross-Appellants,

v.

THE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE,

Cross-Appellee.

STATEMENT ON BEHALF OF CROSS-APPELLANTS DISCUSSING BASIS ON WHICH THIS COURT HAS JURISDICTION TO REVIEW ON APPEAL THE DECREE OF THE COURT OF APPEALS OF MARYLAND.

A.

The statutory provision believed to sustain the jurisdiction of this Court to entertain this cross-appeal is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. L. 397; Title 28, paragraph 344, U. S. C. A.).

B.

The date of the decree to be reviewed is July 16th, 1928 (R. 1622, 1653), made final by the decree of March 20th, 1929 (R. 1712). And the date on which the application for this cross-appeal was presented and allowed is April 9th, 1929 (R. 1727).

C.

The cross-appellee in this case has taken an appeal, which is No. 792 of the October Term, 1928, of this Court, from the decree of the Court of Appeals of Maryland, dated March 20th, 1929. The cross-appellants have appealed from an earlier decree of the Court of Appeals in the same proceedings, made final by the same decree. The matters thus determined by the Court of Appeals of Maryland are so inseparably connected that it is impossible for them to be fully and finally determined by this Court, unless both decrees are here reviewed. It is the contention of the cross-appellants that the main appeal draws to it as an incident thereof the matters sought to be here reviewed by the cross-appellants, and, therefore, justifies this cross-appeal. A short statement of the nature of the case and of the rulings below will now be made so that the jurisdictional questions involved may be made clear.

On August 1st, 1927, the United Railways and Electric Company of Baltimore, hereinafter called the Company (cross-appellee here), filed with the cross-appellants, constituting the Public Service Commission of Maryland, hereinafter called the Commission, an application for an increase in its rates of fare for street railway service in the City of Baltimore, Maryland, and its environs, from eight cents cash, with two tokens for fifteen cents, the then prevailing rate, to a flat ten cent rate, with special half fare and commutation rates (R. 89). After lengthy hearings, the Commission, on February 10th, 1928, denied the application for a flat ten cent fare, but authorized the charging of

a nine cent fare, with three tokens for twenty-five cents (R. 57).

The Commission found that the fare fixed by it would yield the Company a return of 6.26 per cent. on the value of its property, which value was fixed at $75,000,000 (R. 48), and which is not in this Court disputed (R. 1631, 1661).

The Commission, in estimating the expenses of the Company, calculated the annual allowance for depreciation so as to restore to the Company the original cost of its property consumed or retired in service, although the basis of calculation actually adopted was to allow an amount equal to five per cent. of the Company's gross revenue (R. 48). When in 1912 the Company first set up a depreciation account, it used the basis just described, and the uniform practice of the Commission in dealing with the Company has been to use the same basis.

Being dissatisfied with the Order of the Commission, the Company, on March 13th, 1928, filed its Bill of Complaint in the Circuit Court No. 2 of Baltimore City, seeking to vacate and enjoin the Order of the Commission (R. 5-13). The Bill alleged in substance that the Order of the Commission was confiscatory and contrary to the Fourteenth Amendment to the Constitution of the United States, and deprived the Company of its property without due process of law, because (1) the fares fixed by said Order would result in an inadequate rate of return on the value of the Company's property; (2) the annual allowance for depreciation was inadequate and was fixed on an improper basis; and (3) the said Order of the Commission further diminished the inadequate return to be received by the Company by reason of the fact that the Company's second fare zone on its Halethorpe line was abolished and a single fare substituted.

The Circuit Court No. 2 of Baltimore City sustained all of these contentions of the Company with the exception of that as to the Halethorpe line. That is to say, the Circuit Court No. 2 of Baltimore City held that the rate of return resulting from the 8 1/3 cent token fare was confis-

catory, and that the annual depreciation allowance should not have been based on cost, but should have been based on the present value of the Company's depreciable property, and the Order of the Commission in these respects was accordingly vacated, and an injunction issued prohibiting the Commission from enforcing its said Order, in so far as the same limited the rates of fare to be charged by the Company (R. 85-86).

Thereupon the Commission took an appeal to the Court of Appeals of Maryland, the highest Court in the State, and the Company took a cross-appeal. The questions thereby raised by the Commission were:

1. Whether the lower Court was right in holding that the rates of fare fixed by the Commission resulted in an insufficient rate of return to the Company;

2. Whether the lower Court was right in requiring the annual depreciation allowance to be so calculated as to restore present value rather than cost.

The question raised by the Company's cross-appeal was whether the lower Court was right in sustaining the Commission's order abolishing the second fare zone on the Company's Halethorpe line.

The Court of Appeals held (R. 1653, 1622):

1. That the rate of return of 6.26 per cent. on the value of the Company's property, which would be produced by the rates of fare fixed by the Commission, was neither confiscatory nor unreasonable as a matter of law (R. 1647), and that, therefore, the decree of the lower Court vacating the Order of the Commission fixing the schedule of fares to be charged by the Company, and enjoining the Commission's Order in that respect, was erroneous:

2. That the lower Court was right in holding that the annual allowance for depreciation should have been based by the Commission not on cost, but on value, and

that that part of the decree of the lower Court should neither be affirmed nor reversed, but the case should be remanded in order that the Commission might further consider the question of depreciation and make any changes in the rate schedule that might be necessary and requisite to yield to the Company a fair and reasonable rate of return (*i. e.*, not more than 6.26 per cent.) upon the fair value of the Company's property; and

3. That that part of the decree of the lower Court which affirmed the order of the Commission, extending the first fare zone of the Halethorpe line to the terminus thereof should be affirmed.

Thereupon the Company appealed to this Court on the ground that the decree of the Court of Appeals deprives it of its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. The Company's appeal was filed in this Court on September 21, 1928, and was No. 464, October Term, 1928.

The Commission filed in this Court its cross-appeal No. 465, October Term, 1928, simultaneously with the filing of the Company's appeal, raising the question as to whether it is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States to so calculate the annual allowance of the Company for depreciation as to restore the original cost, rather than present day value, of depreciable property consumed or retired in service.

The Commission also filed a petition for a writ of certiorari, on the same grounds.

This Court, on November 19th, 1928, dismissed both appeals, and denied the petition for certiorari, on the ground that the decree of the Court of Appeals, called into question, was not final, within the meaning of Sections 237 (a) and 237 (b) of the Judicial Code of the United States.

Meanwhile, the Commission had made a thorough investigation of the condition of the property of the Company, pursuant to the direction of the Court of Appeals, had held hearings with reference thereto, and entered its Opinion and Order No. 13420, dated November 28th, 1928, increasing the Company's annual depreciation allowance to $1,638,660, computed on a basis of value, or $755,116 more than the original allowance of $883,544, calculated to restore cost, of property consumed or retired in service, and increasing the fare charged by the Company to the public to ten cents cash, with four tokens for thirty-five cents (R. 1691).

On December 12th, 1928, the Company filed in the Circuit Court No. 2 of Baltimore City its Supplemental Bill of Complaint (R. 1681), containing the same allegations as to rate of return and the extension of the single fare zone to Halethorpe as did the original Bill of Complaint, and reciting the proceedings above outlined regarding the question of depreciation, but not complaining of the Commission's action with respect thereto. This Supplemental Bill was dismissed on January 10th, 1929 (R. 1705), and this action affirmed by the Court of Appeals on March 20th, 1929 (R. 1712).

Thereupon, the Company again appealed to this Court, the appeal being filed on March 27th, 1929, and being No. 792, October Term, 1928. The Commission has also again appealed with respect to the proper basis for calculating the annual depreciation allowance, its appeal being No. 826, October Term, 1928.

It is apparent, therefore, that the appeal of the Company is based on its claim that the decree of the Court of Appeals, upholding the action of the Commission as to rate of return, held valid a State statute claimed to be invalid under the Constitution of the United States, and, therefore, denied the Company's claim of Federal right, with the result that this Court has jurisdiction to determine the Company's appeal under Section 237 (a) of the Judicial Code.

As already stated, the Company claimed, in the Court of

Appeals of Maryland, that the action of the Commission in fixing its annual depreciation allowance so as to restore the *cost*, rather than the *present value* of its depreciable property, constituted a deprivation of its property under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals upheld this contention of the Company, thereby sustaining its claim of Federal right, so that ordinarily the Commission would have no right to take an appeal to this Court, but would be required to proceed by way of certiorari under Section 237 (b). The Commission, out of abundant caution, has already filed such a petition in this Court as a motion in this case. The Commission here contends, however, that this Court has jurisdiction to entertain this cross-appeal.

The Court of Appeals of Maryland held (R. 1647) that a schedule of fares which would yield to the Company a return of 6.26 per cent. on the value of its property, was neither confiscatory nor unreasonable as a matter of law; but it further held that the question as to whether or not the schedule of fares fixed by the Commission would in fact yield the Company that percentage of return, depended on whether or not the depreciation allowance was sufficient. And in passing on this question the Court of Appeals further decided that the basis of cost used by the Commission was illegal and that the basis of present value contended for by the Company should have been adopted; but the Court found itself unable to say on the facts in the Record what amount in dollars should have been allowed (R. 1648), and accordingly remanded the case to the Commission in order that it might consider and determine the proper allowance for depreciation, in accordance with the rule of law laid down by the Court (R. 1648, 1653). It is apparent that in fact, as well as under the rulings of the Court of Appeals, the question of depreciation is so intimately interconnected with the question of the rate of return that the latter question cannot be decided without consideration of the former. And the Circuit Court No. 2 of Baltimore City expressly found this to be the case (R. 67).

D.

1. Jurisdiction to Entertain Cross-Appeal.

The cases believed to sustain the jurisdiction of this Court to entertain this cross-appeal are the following:

Union Tool Company v. Wilson (1922), 259 U. S. 107;
Walsh v. Mayer (1884), 111 U. S. 31;
United States v. Mosby (1889), 133 U. S. 273.

These cases, taken in combination, sustain the following propositions: (1) that jurisdiction of a cross writ of error will be entertained even though the plaintiff in error in such cross writ of error had no independent right to a writ of error at all, but only a right to proceed by way of appeal; and even though such cross writ of error was sued out at a time when the plaintiff in error could not have prosecuted an appeal because the judgment was not as to him at that time a final judgment. (2) That jurisdiction of a cross appeal will be entertained, though involving less than the statutory jurisdictional amount and though consequently the cross-appellant could not have maintained an appeal himself.

In *Union Tool Company v. Wilson, supra,* the Court said:

> "The contention that the Court of Appeals was without jurisdiction of the cross writ of error is renewed here. It is argued that the judgment for contempt, so far as now sought to be reviewed, is remedial, not punitive; that, being remedial, it can be reviewed only on appeal, and not on writ of error; that an appeal will not lie until after the final decree; and that no final decree had been entered, as the accounting was still in process. It is true that the part of the judgment for contempt now under review is remedial. But it does not follow that the Court of Appeals lacked jurisdic-

tion to review it on the cross writ of error. The district court entered a single order, part remedial, part punitive. Where a fine is imposed partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of review. *Re Merchants' Stock & Grain Co.*, 223 U. S. 639. If the company had acquiesced in the judgment entered, Wilson, having no right to initiate a review of the punitive part, could not have instituted any appellate proceeding until after final decree. *Re Christensen Engineering Co.*, 194 U. S. 458; *Doyle v. London Guarantee & Acci. Co.*, 204 U. S. 599; See also *Alexander v. United States*, 201 U. S. 117. But an order punishing one criminally for contempt is a final judgment. The contemner may obtain immediately a review by writ of error. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324. And the company availed itself of this right. When the order was thus brought before the Court of Appeals, it acquired, at the company's instance, jurisdiction to review that part which was civil as well as that which was criminal in its nature. In the exercise of that jurisdiction it granted, in respect to Double, relief which affected both the criminal and the civil parts of the order. If a cross writ of error had not been filed, Wilson could not have secured from the Court of Appeals relief in respect to that part of the order which was unfavorable to him. *Bolles v. Outing Co.*, 175 U. S. 262. But a cross writ was duly filed, and that enabled the court to review the portion of the order, civil in its nature, which Wilson alleged to be erroneous; for the judgment in the contempt proceeding was a unit. The case resembles in some respects *Mayer v. Walsh*, 108 U. S. 17; *Walsh v. Mayer*, 111 U. S. 31. Compare *Field v. Barber Asphalt Paving Co.*, 194 U. S. 618. The facts relating to the sale of spare parts were agreed; and the question before the court was merely as to their

legal effect. That question could appropriately be considered on cross writ of error, even without resort to the power conferred by Section 4 of the Act of September 6, 1916, chap. 448, 39 Stat. at L. 726, Comp. Stat. Section 1207, Fed. Stat. Anno. Supp. 1918, p. 411."

In *Walsh v. Mayer, supra,* the Court said at page 37:

"We have disposed of the case upon both appeals. The motion to dismiss the cross appeal of the defendants below, for want of jurisdiction, on the ground that the amount in controversy is less than $5,000 is overruled. The cross appeal, it is true, is from a decree awarding against the defendants below less than that amount, and it could not, therefore, be maintained by itself; but the appeal of the plaintiffs below, to which it is incident, opened the whole controversy here, so far as they were concerned, and that of the defendants must be allowed to have the like effect as to them; so that upon both appeals the case was brought up as it stood for hearing in the court below, the claims of the respective parties involving the question of liability as to the whole amount."

In *United States v. Mosby,* the Court said at page 289:

"It is contended for the United States that the claimant has no right to appeal in regard to the items which he claims were improperly disallowed, because they do not in the aggregate amount to more than $3,000. But we are of opinion that, as section 707 of the Revised Statutes authorizes an appeal to this court on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and as the appeal by the United States in this case is from the judgment of $13,839.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum."

It is, of course, true that each of the cited cases involved a proceeding in the Federal Courts and did not involve, as in the case at bar, an appeal or writ of error from the highest Court of a State, and this consideration may be advanced to distinguish the case at bar from these authorities.

Mr. Justice Brandeis, however, in his opinion in the *Union Tool Company case, supra,* considered the doctrine announced by these cases as of general application; he did not place the decision on the ground that in the federal courts the whole record is open up on writ of error. This is shown by the fact that *Field v. Barber Asphalt Co.,* 194 U. S. 618, cited in the extract above, is cited for comparison only and not as controlling authority. Furthermore, in the case at bar, our contention is that the decree made final by the decree from which this cross-appeal is taken, involves a Federal question which is inseparably connected with the Federal question involved in the main appeal. If such a question could not be raised by cross appeal in seeking review of the decision of the highest court of a State, a litigant might be able to invoke review of part only of an inseparable Federal question actually presented by the case.

2. Finality of Decree.

The decree of the Court of Appeals of Maryland, dated July 16th, 1928, is subject to review in these proceedings, the decree of March 20th, 1929, being final in character, within the meaning of Section 237 (b) of the Judicial Code.

As Mr. Chief Justice White said in *Louisiana Navigation Co. v. Oyster Commission* (1912), 226 U. S. 99:

> "The rule which excludes the right to review questions arising in a cause depending in a State Court until a final judgment is rendered by said Court involves as a necessary correlative the power and duty in this Court when a final judgment in form is ren-

dered and the cause is brought here for review, to consider and pass upon all the Federal controversies in the cause, irrespective of how far it may be that by the State law such questions were concluded during the litigation, and before a final judgment susceptible of review here was rendered."

3. Federal Question.

The decree of the Court of Appeals of Maryland under consideration involves a Federal question reviewable by the Supreme Court of the United States.

Article 23, Section 404 of Bagby's Annotated Code of the Public General Laws of Maryland (1924), which is Section 43 of the Maryland Public Service Commission Law (Md. Acts 1910, Ch. 180), provides, in part, as follows:

> "Any corporation subject to this sub-title, or any of the provisions of this sub-title, and any person in interest being dissatisfied with any order of the Commission, fixing any rate or rates, tolls, charges, schedules, joint rate or rates, or any order fixing any regulations, practices, acts or service, may commence any (an) action in the Circuit Court for any county, or before any judge of the Supreme Bench of Baltimore City, in any court of Baltimore City of appropriate jurisdiction which may be adopted for the purpose, against the commission as defendant to vacate and set aside any such order on the ground that the rate or rates, tolls, charges, schedules, joint rate or rates, fixed in such order is *unlawful,* or that any such regulation, practice, act or service fixed in such order is *unreasonable,* in which action a copy of the complaint shall be served with the summons." (Italics ours.)

The functions of the Maryland courts in reviewing a decision of the Commission are accordingly limited to the question of whether it is unlawful or unreasonable, or both:

"The first rule is, the order will not be disturbed except upon clear and satisfactory evidence that it is unreasonable or unlawful. This is a legislative mandate which is reinforced by the fact that the Commission is a tribunal erected by law, informed by experience, and assisted by a trained corps of subordinates."

Public Service Commission v. Byron (1927), 153 Md. 464.

It will be noted that the statutory provision in terms purports to limit review of rate-fixing orders to the question of *lawfulness*. No such limitation has been imposed in its judicial construction, however. In the case above cited, the Maryland Court of Appeals held that the Commission has

"an indivisible power to pass lawful and reasonable orders in the performance of its statutory duties."

In *Interstate Commerce Commission v. Union Pacific Railroad Company* (1912), 222 U. S. 541, cited with approval as to this point by the Court of Appeals in the *Byron Case, supra,* the content and limits of the two words above used were indicated. At page 547, Mr. Justice Lamar said:

"In cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule

that the substance, and not the shadow, determines the validity of the exercise of the power."

The situations assumed in divisions (5) and (6) of the foregoing outline are instances of an unreasonable, as distinguished from a merely unlawful, order. The use of the word "unreasonable" in the statute does not mean that the Court will substitute its judgment for that of the Commission.

> "If the order be found such that reasonable men might well differ as to its correctness, it cannot be said to be unreasonable."
>
> *M., St. P. & S. S. Ry. v. R. R. Comm.*, 136 Wis. 146, cited with approval in the *Pennsylvania Railroad Company case, infra.*

The Court of Appeals, in the case of *Pennsylvania R. R. Co. v. Public Service Commission*, said (126 Md. 59, at 78):

> "The whole duty, power and function of the Court in such cases was well summed up by Chief Justice White in *Ill. Cent. R. R. v. Int. Com. Comm.*, 215 U. S. 470, when he said:
>
> " 'Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and (c) a proposition that we state independently, although in its essence it may be contained in the previous one, viz., whether although the order may be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule, that the substance and not the

shadow determines the validity of the exercise of the power. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions, by setting aside a *lawful* administrative order upon our conception as to whether the administrative power has been *wisely* exercised.' " (Italics ours.)

And the Court of Appeals of Maryland said in the *Byron case, supra*:

"When such a question reaches an appellate tribunal for review in an effort to have the order annulled, the court has no power to substitute its own judgment for that of the Commission, and unless it be made to appear by clear and satisfactory evidence that the order was unreasonable, the courts are powerless to set it aside on that ground."

There is, then, a *prima facie* presumption of reasonableness of the action of the Commission, provided that the action be lawful. Once the lawfulness be established, the Court will not substitute its judgment for that of the Commission, or interfere with the order unless it is manifestly arbitrary. And the arbitrary character must be established by evidence. But if the order be unlawful, by reason, for instance, of repugnance to the Federal Constitution, it might be said by the Court, as was done in this case, to be unlawful and unreasonable, because unlawfulness is found as a matter of constitutional right, and unreasonableness, assuming the hypothesis of unconstitutionality, follows.

The decision of the Court of Appeals does not rest, as a self-sufficient and independent ground of judgment, on a

determination that calculating the annual depreciation allowance so as to restore cost, and not value, of depreciable property is *unreasonable*. It turns, not on an analysis of testimony, but on a question of law. The Court, after criticising the action of the Commission in *basing* the annual depreciation allowance on gross revenues of the Company, said:

> "But even so, if the conclusion actually reached was proper, the fact that it was reached by improper methods, would not justify us in disturbing it, so that the more important question is whether the base of the calculation by which it was tested (the restoration of cost, not value, of depreciable property consumed or retired in service), was itself *lawful.*" (Italics ours.) (R. 1649.)

As to this, the Court said that it involved

> "substantive rights protected by constitutional guaranties" (R. 1648), and that "to require the Company to sell its service at rates which made no provision at all for the replacement or repair of the property when worn out or obsolete, would be plain confiscation, and to require it to sell it at rates that make an inadequate provision for the return of its value when worn out or obsolete as a result of public service, can be no less" (R. 1650).

Any incidental imputation of unreasonableness in the opinion of the Court is predicated upon an assumption of unlawfulness, *i. e.*, unconstitutionality. The Court did not rest its opinion upon this ground as an independent base, nor consider the question in such a manner that it could have done so.

> "The mere ruling that there was evidence sufficient to authorize the consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. Mere conjecture may not be indulged in for the purpose of

concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect."

St. Louis, I. M. & S. R. Co. v. McWhirter (1913), 229 U. S. 265.

Obviously, the question of the lawfulness of the order in this case *includes* the question as to whether the order is invalid, as a matter of law, under the provisions of the Fourteenth Amendment to the Constitution of the United States. As a matter of fact, the constitutional validity of the order was the *only* question considered by the Court in connection with the lawfulness of the order. The opinion is expressly based upon a finding of confiscation, and predicated upon an assumption of the existence of constitutional guaranties. The finding of unlawfulness is tantamount, and only tantamount, to a finding of unconstitutionality.

The Company attacked the order as repugnant to both the Federal and State Constitutions. Article 23 of the Maryland Declaration of Rights (Bagby's Annotated Code of the Public General Laws of Maryland, 1924, vol. 1, p. 57), provides:

"That no man ought to be taken, or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land."

This is the only applicable section of the Maryland Constitution. It is coextensive with the Fourteenth Amendment to the Federal Constitution, *Niles, Maryland Constitutional Law*, p. 46. The Court might have rested its decision on either the Federal or the State Constitution, or both. Either, alone, would have been sufficient. The Federal Constitution was, of course, of paramount sanction. For that reason, apparently, the decision is predicated on the Fourteenth Amendment alone. For that Amendment is re-

ferred to throughout the opinion, while Article 23 of the Declaration of Rights is never mentioned.

It is well settled that where the State court bases its decision in part on non-Federal grounds, which are in themselves broad enough to sustain it, a Federal question presented by the case will not be reviewed by the Supreme Court of the United States, *Consolidated Turnpike Co. v. Norfolk and Ocean View Ry. Co.* (1913), 228 U. S. 596, even though the decision on the non-Federal ground be deemed erroneous. *Arkansas S. R. Co. v. German National Bank* (1907), 207 U. S. 270. And where it does not appear on which of two grounds the judgment was based, and the non-Federal ground is a good and valid one, sufficient in itself to sustain the judgment, the Supreme Court will not review the decision. *Klinger v. Missouri* (1871), 80 U. S. 257.

But the mere fact that the decision *might have been* rested on non-Federal grounds, does not preclude review. *Henderson Bridge Co. v. City of Henderson* (1899), 173 U. S. 592.

In the present case, the State Court might have based its action on non-Federal grounds. It does not appear that it did so. Virtually its sole inquiry was as to the *lawfulness* of the order; it tested that by constitutionality; and its only references indicating detailed judicial consideration are to the Fourteenth Amendment to the Constitution of the United States. Certainly there is no indication that the Court regarded any independent and non-Federal ground as a separate and sufficient basis for its decree.

It may be noted in passing that some doubt might be entertained as to the validity of such State grounds, under the Federal Constitution, even had they been advanced as an independent basis for the opinion. *Georgia Railway and Power Co., v. Railroad Commission of Georgia* (U. S., D. C. N. D., Ga., N. D.—Master's Report, 1924), P. U. R. 1925 A, 546, at 595. But no such question is presented. The decision is rested on a Federal ground, and is a proper subject for review by this Court.

4. Commission's Capacity to Sue.

The Public Service Commission of Maryland has the legal capacity to prosecute this cross-appeal to review the decision against it by the Court of Appeals of Maryland. See the following cases:

Blodgett v. Silberman (April 16, 1928), 72 Law Ed. 470, at 472:

In this case the State Tax Commissioner of Connecticut computed a transfer tax on certain property owned by a resident of Connecticut, which property, however, was physically located in New York. The highest Court of Connecticut held that certain items of such property were not subject to the Connecticut transfer tax because they were not within the taxable jurisdiction of Connecticut, and, therefore, could not be taxed by that State without violating the Fourteenth Amendment to the Federal Constitution. The State Tax Commissioner thereupon applied for and was allowed a writ of certiorari from the Supreme Court of the United States, to review the adverse action of the highest State Court. The Supreme Court granted the writ and decided the case on the merits; thereby necessarily holding that such a state official had a standing to question in this Court, the decision of the highest Court of his State.

Nor does the case at bar fall within the line of decisions in which the right of public officers and public bodies exercising ministerial functions, to review in the Supreme Court of the United States adverse rulings of the highest Court of the State, under certain circumstances, has been questioned.

Braxton County Court v. West Virginia (1908), 208 U. S. 192.

The rule in question only applies where the officer or body seeking the review does not occupy a representative capacity with respect to the interests which he is seeking to protect.

Board of Liquidation v. Louisiana (1901), 179 U. S. 622.

The Maryland Public Service Commission has been designated by the Court of Appeals of Maryland as

> "the statutory public defender or representative of all interests, save those which are participating in the attack upon the order, since any one not objecting becomes through acquiescence identified with the public, whose rights and interests always are the primary concern of the Commission, which at once asserts and protects them through its official position."
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> *Public Service Commission v. Byron* (1927), 153 Md. 464, at page 471.

The Commission, accordingly, is fully empowered to raise the question here presented for review.

Respectfully submitted,

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Baltimore, Maryland,
April 27th, 1929.